Supreme Court, U.S.
FILED
AUG 18 2006
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No. 06- 06-250

In The

Supreme Court of the United States

OPERATORS AND CONSULTING SERVICES, INC. AND ZURICH AMERICAN INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DANOS & CUROLE MARINE CONTRACTORS, INC., THE GRAY INSURANCE COMPANY, AND JAMES MORRISON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI OF OPERATORS AND CONSULTING SERVICES, INC. AND ZURICH AMERICAN INSURANCE COMPANY

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QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit and the Benefits Review Board erred by failing to properly apply established precedent of the Fifth Circuit and at least two other Circuit Courts under the Longshore and Harbor Workers' Compensation Act, holding that where an employee experiences an aggravation or exacerbation of a pre-existing injury, however minor, while working for a subsequent maritime employer, and that employee's condition ultimately results in a disability while working for the subsequent maritime employer, the subsequent maritime employer shall be responsible for all benefits owed to the employee, thereby creating a conflict among the Circuit Courts?

LIST OF PARTIES AND DESIGNATION OF CORPORATE RELATIONSHIPS

The named appellants in the Court of Appeals and the Petitioners herein are Operators and Consulting Services, Inc. and Zurich American Insurance Company. The named appellees in the Court of Appeals and the Respondents herein are Danos & Curole Marine Contractors, Inc., The Gray Insurance Company, James Morrison, and the Director, Office of Workers' Compensation Programs, United States Department of Labor. Operators and Consulting Services, Inc. does not have any parent companies. Zurich American Insurance Company is a wholly owned subsidiary of Zurich American Insurance Group.

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CONCISE STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its decision in this appeal on March 31, 2006. Thereafter, petitioners filed a timely Petition for Rehearing En Banc on May 8, 2006.[1] The Fifth Circuit denied petitioners' Petition for Rehearing En Banc on May 22, 2006.

This Honorable Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

1. Longshore and Harbor Workers' Compensation Act – Section 902(10)

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean

[1] The United States Department of Labor is a party to this appeal. Therefore, pursuant to Federal Rule of Appellate Procedure 40(a), petitioners had 45 days in which to file their Petition for Rehearing En Banc.

> permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2).

33 U.S.C. §902(10).

CONCISE STATEMENT OF THE CASE

James Morrison (hereinafter "Morrison") filed a claim for compensation benefits pursuant to the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. §901, *et seq.*, against Operators and Consulting Services, Inc. (hereinafter "OCS," "Petitioner") and Zurich American Insurance Company (hereinafter "Zurich," "Petitioner") and, thereafter, Danos & Curole Marine Contractors, Inc. (hereinafter "Danos & Curole," "Respondent") and The Gray Insurance Company (hereinafter "Gray," "Respondent"). The issues raised could not be resolved administratively, and a formal hearing was held before an Administrative Law Judge (hereinafter "ALJ") on January 23, 2003.

In his Decision and Order, the ALJ held that OCS and Zurich were the responsible employer and carrier, respectively, and that Danos & Curole and Gray were not liable for Morrison's disability and benefits.

OCS and Zurich filed a Notice of Appeal of the Decision and Order with the Benefits Review Board (hereinafter "BRB"). The BRB affirmed the ALJ's Decision and Order, without modification. (*See* Appendix at App. 14).

OCS and Zurich filed a Petition for Review in the United States Court of Appeals for the Fifth Circuit. A panel issued its decision on May 12, 2005 (*see* Appendix at App. 23), after which Petitioners filed a Petition for Rehearing En Banc. Thereafter, the panel *sua sponte* withdrew its decision, and oral argument was granted, rendering the Petition for Rehearing En Banc moot. (*See* Appendix at App. 30). The subsequent panel's decision was issued on March 31, 2006, affirming the lower courts' decisions. (*See* Appendix at App. 1). Thereafter, a Petition for Rehearing En Banc was filed and the subsequent panel denied the Petition. (*See* Appendix at App. 31).

ARGUMENT

A. Statement of Facts

Morrison was hired by OCS as a field mechanic. His job was "heavy," requiring strenuous physical labor. Between October 16, 1997, the date of the original accident, and May 1998, when he was hired by Danos & Curole, Morrison's ***functional capacity*** did not deteriorate. He performed the same job, requiring the same physical demands. Morrison did not miss any work with OCS. He first became disabled in September 1998, after working approximately five months for Danos & Curole.

Danos & Curole confirmed that there was absolutely no difference between Morrison's job with OCS and his job with Danos & Curole, in which he worked for approximately ***five months*** before going on disability. Morrison passed all phases of the hiring process, and was offered the ***exact same job*** he held with OCS at the ***same*** work location.

The Fifth Circuit readily acknowledged that both Dr. Gramlich (treating chiropractor) and Dr. Wilson (treating neurosurgeon) admitted that Morrison's employment with ***Danos & Curole*** could have exacerbated Morrison's back. Significantly, Morrison treated with Dr. Wilson only ***after*** working for Danos & Curole for approximately five months. Dr. Wilson testified based on a reasonable degree of medical probability that Morrison would not have needed surgery had he stopped working in his heavy job when his employer changed from OCS to Danos & Curole.

B. The Fifth Circuit's Decision Runs Contrary to the Well-Established Last Responsible Employer Rule

This Court reviews the lower courts' decisions for errors of law and adherence to the substantial evidence standard. The BRB's interpretation of the LHWCA is a question of law that is reviewed *de novo*. *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co.*, 339 F.3d 1102, 1105 (9th Cir. 2003).

The simple issue presented in this LHWCA claim is whether Morrison's five-month employment with Danos & Curole aggravated, accelerated, exacerbated, contributed to, or combined with his original injury incurred with OCS. The issue ***is not*** whether Morrison experienced a "traumatic event" while working for Danos & Curole, as suggested by the Fifth Circuit.

The Fifth Circuit perpetuated the error committed by both the ALJ and the BRB by citing, and then seemingly ignoring, the express testimony of the health care providers. The health care providers conceded that Morrison's work with Danos & Curole exacerbated his lumbar back

condition. More importantly, the Fifth Circuit failed to distinguish this claim from the several prior cases cited by Petitioners presenting the ***exact same*** facts as involved herein.

The evaluation begins with the definition of "injury" under the LHWCA. Morrison must have sustained some harm or pain caused by conditions at work, or an accident occurred that could have caused the harm or pain. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). An injury occurs when something unexpectedly goes wrong within the human frame. *Johnson v. Brady-Hamilton Stevedore Co.*, 11 BRBS 427, 430 (1979).

An injury may be the ***aggravation***, ***exacerbation***, or ***acceleration*** of a pre-existing condition, in which case ***the employer at the time of the aggravation, exacerbation, or acceleration*** is liable for the full extent of the resultant disability. *Corcoran v. Preferred Stone Setting*, 12 BRBS 201, 205 (1980).

If a second injury (*e.g.*, pain caused by conditions at work) ***aggravates, accelerates, exacerbates, contributes to***, or ***combines with*** the employee's first injury to cause greater disability, the second injury is compensable and the last employer is responsible for the entire disability. *Employers National Ins. Co. v. Equitable Shipyards*, 640 F.2d 383 (5th Cir. 1981), *aff'g, Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). Nowhere in the above definitions is a "traumatic event" required – all that is required is some harm or pain caused by conditions at work.

The "Aggravation Rule" (also referred to as the "last employer rule") applies to injuries which are not caused by

identifiable incidents, but which are ***gradually produced by work activities*** or conditions not peculiar to the employee's employment. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 623-24 (9th Cir. 1991); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). When an employee sustains a second work-related injury, as defined above, that injury need not be the primary factor in the resultant disability for compensation purposes. *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).

Significantly, the fact that the earlier injury was the "precipitant event" is not determinative. Rather, the determinative question is whether the employee's subsequent work ***aggravated or exacerbated*** the employee's condition first manifested earlier. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 243 (3rd Cir. 2002).

Finally, under the LHWCA, "disability" is defined, in part, as the "incapacity because of injury to earn the wages which the employee was receiving at the tin of injury in the same or any other employment. . . . " 33 U.S.C. §902(10). Accordingly, for there to be a finding of "disability," the employee must have an economic loss coupled with a physical impairment. *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 110 (1991).

In this claim, Morrison was able to ***function*** while working for OCS. His work with Danos & Curole caused ongoing, ***increasing*** pain. In other words, his physical condition was exacerbated. This was admitted by Morrison and the health care providers, and acknowledged by the Fifth Circuit. After working for Danos & Curole for ***five months***, Morrison's lumbar back stopped functioning.

This caused his disability, *i.e.*, his inability to earn wages. Morrison's continued flare-ups of pain and related events while working for Danos & Curole aggravated, accelerated, exacerbated, contributed to, and/or combined with the original injury.

This observation was compounded by the Fifth Circuit acknowledging that Dr. Gramlich and Dr. Wilson testified that Morrison's ongoing performance of his job with Danos & Curole very well could have exacerbated Morrison's condition; yet the Fifth Circuit proceeded to ignore these observations by ruling that there was no subsequent injury, notwithstanding that the substantial evidence clearly met the LHWCA's definition of "injury." In so doing, the Fifth Circuit accepted the health care providers' "lay" attempts to apply legal theories (*i.e.*, "natural progression" versus "exacerbation") to their medical world. Such an effort produces errant results, such as that reached herein. It also leads to inconsistent results among the circuit courts.

The most problematic issue inherent in the lower courts' decisions is the failure to distinguish the four cases discussed by Petitioners, all of which are directly on point, but reached contrary conclusions.

In *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co.*, 339 F.3d 1102 (9th Cir. 2003), *cert. denied*, 534 U.S. 940, 125 S.Ct. 309 (2004), the court found that a ***one day*** minor aggravation (*e.g.*, increase in pain during the work day) was sufficient to place liability on the employer for which the employee worked at the time he went on disability. In that case, the employee was a mechanic and later a forklift driver, working for several different companies over the course of approximately 30

years. Early in his employment, he developed knee pain which increased over time. In 1992, he sought medical care for his knee condition and, in 1993, his physician stated that he would need a knee replacement. The employee continued to receive ongoing medical treatment, all the while working, and he eventually asked his doctor to schedule surgery. After the surgery was scheduled, the employee changed employers to another maritime employer, for which he worked for ***one day***. During the course of that day, as he performed his job duties, his pain became progressively worse. Surgery was performed two days later, and a claim was filed against that last maritime employer for which the employee had only worked one day. *Id.* at 1104. Citing the above law, the court held that the employee's "last employer is liable for all compensation due, even though prior employment may have contributed to the disability." *Id.* at 1104 (citing *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 623 (9th Cir. 1991)). Because the employee's work on that single day aggravated the underlying knee condition, there was a disability and the last maritime employer was held liable. *Id.* at 1105-07.

The instant case does not involve a ***one day*** aggravation – it involves a ***five month*** aggravation. No dispute exists that Morrison performed his regular job with Danos & Curole. Morrison testified that the harder he worked with Danos & Curole, the greater his back hurt. Morrison did not begin treatment with his neurosurgeon until five months after being hired by Danos & Curole. Accordingly, Danos & Curole should be deemed the last responsible employer.

In *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621 (9th Cir. 1991), the employee worked as a pile

butt driver for the first employer. The second employer took over the operations from the first employer. The employee continued to work in the exact same job for an additional six months. At that time, the employee stopped working on the advice of his physician, due to his deteriorated back condition. *Id.* at 622. After reviewing the development of "the last employer rule," the court ruled that the employee suffered from a cumulative trauma with the second employer. *Id.* at 624. Significantly, the court observed that "the aggravation [two-injury] rule applies ***'even though the worker did not incur the greater part of his injury with that particular employer.'***" *Id.* (citing *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839-40 (9th Cir. 1991) (quoting *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 519 n.10 (5th Cir. 1986) (en banc))) (emphasis added). Because the substantial evidence demonstrated that the employee's current back condition "aggravated" his pre-existing back injury, the second employer was liable under the LHWCA. *Id.* at 624.

Like Danos & Curole herein, the second employer in *Foundation Constructors* argued that the employee's degenerative back condition was due entirely to the inevitable course of his injuries with the first employer. However, in dismissing this argument, the court correctly recognized that the physicians concluded that the continued work in a strenuous job was "harmful" to the employee's back condition. In fact, one physician attributed the employee's condition to "cumulative trauma" caused by his "extremely hard" work. *Id.* at 624. Accordingly, the second employer was liable for the entire disability.

The similarities between *Foundation Constructors* and the instant claim are uncanny. The employee in *Foundation Constructors* and Morrison worked for one employer

and, during their employment, the employers changed, but the employees' job duties and work locations remained the same. The employees worked for approximately the same amount of time for the subsequent employers before going on disability with back problems. These cases cannot be distinguished.

In *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233 (3rd Cir. 2002), the employee was a mechanic working for the first employer. At some point in mid-1996, the employee suffered a back injury during the course of his employment, causing him to undergo medical treatment. *Id.* at 235-37. In August 1997, the second employer acquired the first employer's interest in the facility where the employee was working. "Operations at the facility continued as before and the nature of [the employee's] work did not change after August of 1997." *Id.* at 237. After several months of work, performing the same job activities as before, the employee was placed on disability status. *Id.* at 237-39.

The court acknowledged that "if the conditions of a claimant's employment cause him to become symptomatic, even if no permanent harm results, the claimant has sustained an injury within the meaning of the Act." *Id.* at 241 (quotation omitted). "[W]here claimant's work results in a ***temporary exacerbation*** of symptoms, the employer ***at the time of the work events leading to this exacerbation is responsible for the resulting . . . disability.***" *Id.* (quotation omitted) (emphasis added). Importantly, the court observed that the employee's underlying degenerative disc disease "was to be expected," which required the employee to undergo certain medical treatment. "***However, he was able to continue work***" until his back

condition worsened to the point where he missed work. *Id.* at 242 (emphasis added).

The second employer argued that the employee's condition "was merely a natural progression of the original injury rather than the result of employment that aggravated or accelerated [the employee's] condition resulting in disability." *Id.* In response, the court asserted that "the fact that the earlier injury was the 'precipitant event' is not determinative. * * * the determinative question is whether [the employee's] subsequent work aggravated or exacerbated [the employee's] condition" first manifested with the first employer. *Id.* at 243 (quotation omitted). Accordingly, the second employer was liable for the disability.

Delaware River Stevedores, Inc. cannot be distinguished from this claim: both employees were mechanics, both worked for one employer with the operations being assumed by a subsequent employer during their employment, both employees' job duties and work locations remained the same, and both employees' physical conditions were aggravated or exacerbated by their work activities with the second employers.

In *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), the claimant suffered from a continuing shoulder rotator cuff tear. The claimant experienced flare-ups of pain, which disrupted his work with the first employer. He then voluntarily terminated his employment and accepted a job with the second employer. While working for the second employer, he suffered another flare-up of pain, causing him to miss work. He then brought identical claims against both employers. The court held that the second employer was responsible for the disability, because

it employed the claimant at the time of his most recent aggravation. The court also held that the disability resulted from the continued use of the claimant's arm, and each flare-up of pain represented cumulative trauma and aggravated the underlying injury which was compensable. *Id.* at 1311.

In the instant claim, Morrison experienced a work injury on October 16, 1997 while working for OCS. However, no "disability," as defined under the LHWCA, resulted from this accident. Rather, Morrison was placed on light duty for two or three hitches. Thereafter, he resumed his full duty position as a mechanic with OCS. Morrison ***never*** missed any work with OCS.

Morrison's performance of his strenuous job with Danos & Curole led him to experience numerous exacerbations of his pain. Importantly, Morrison independently reported to Dr. Wilson that as part of his job duties, he was required to carry some heavy tools with him, and he was required to lift some heavy things from the boat or swing over and do something. Morrison reported that "it was killing his back to do that stuff." Further, Morrison reported that the pain was exacerbated by bending for long periods of time and picking up weights. The most prominent exacerbation of his pain occurred after he worked on the major overhaul of an engine ***for Danos & Curole***, 15 to 16 hours per day, for seven straight days. The more he worked, the more his pain increased.

Morrison's work history and progressive physical condition, which ultimately disabled him after working for five months with Danos & Curole, is no different than the employees in *Metropolitan Stevedore Co.*, *Kelaita*, *Foundation Constructors*, and *Delaware River Stevedores, Inc.* As

in those cases, Danos & Curole, the second employer, should be held liable for Morrison's disability.

As aptly recognized by one court, the assignment of liability to Danos & Curole and Gray might seem harsh, because Morrison had suffered from a back injury with OCS.

> However, there is inherent virtue in the "last responsible employer" rule. Each employer subject to the LHWCA shares the risk that it will bear the burden of compensation at one point or another, even if it was not predominantly responsible for the compensable injury. The unfairness to the last employer is mitigated by two factors: the spreading of the risk through mandatory insurance, and the availability of the second injury fund to the last employer in some cases. * * * [T]his rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since all employers will be the last employer a proportionate share of the time.

Metropolitan Stevedore Co., 339 F.3d at 1107 (quotation omitted). Accordingly, Danos & Curole and Gray should be deemed the responsible employer and carrier.

CONCLUSION

Based on the foregoing argument, Petitioners request this Honorable Court to deem Danos & Curole and Gray the responsible employer and carrier, respectively. Further, Petitioners request that this Honorable Court order Danos & Curole and Gray to fully reimburse all benefits

paid to or on behalf of Morrison for this LHWCA claim to Zurich, and to be responsible for all future benefits under the LHWCA.

Respectfully submitted,

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APPENDIX

OPERATORS & CONSULTING SERVICES, INCORPORATED; ZURICH AMERICAN INSURANCE COMPANY, Petitioners v. DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; DANOS & CUROLE MARINE CONTRACTORS INCORPORATED; GRAY INSURANCE COMPANY; JAMES MORRISON, Respondents

No. 04-60598

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

170 Fed. Appx. 931; 2006 U.S. App. LEXIS 7992

March 31, 2006, Filed

COUNSEL: For OPERATORS & CONSULTING SERVICES, INCORPORATED; ZURICH AMERICAN INSURANCE COMPANY, Petitioners; ZURICH AMERICAN INSURANCE COMPANY, Petitioners: Glenn Martin Giles, Dallas, TX.

For DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR: Thomas O Shepherd, Jr, Clerk, Benefits Review Board, Washington, DC; Donald Shire, Barry H Joyner, US Department of Labor, Washington, DC; Michael O Brewer, David Duhon, US Department of Labor, New Orleans, LA.

For DANOS & CUROLE MARINE CONTRACTORS INCORPORATED; GRAY INSURANCE CO; JAMES MORRISON, Respondents: Douglass M Moragas, Harahan, LA.

For JAMES MORRISON, Respondent: Gregory Lewellyn, Columbia, LA.

JUDGES: Before JONES, Chief Judge, and KING and DENNIS, Circuit Judges.

OPINION BY: KING

OPINION:

KING, Circuit Judge:*

Petitioners Operators & Consulting Services, Incorporated and Zurich American Insurance Company seek review of an order of the Department of Labor's Benefits Review Board. In this order, the Benefits Review Board affirmed the decision of an administrative law judge which imposed an employee's medical costs and disability payments upon Operators & Consulting Services under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* The petitioners argue that the Benefits Review Board misapplied the "aggravation rule" and erroneously concluded that the decision of the administrative law judge was supported by substantial evidence. For the reasons provided below, this petition for review is DENIED and the decision of the Benefits Review Board is AFFIRMED.

I. BACKGROUND

A. Factual Background

Pursuant to a contract with Burlington Resources ("Burlington"), petitioner Operators & Consulting Services, Inc. ("OCS") provided workers to operate an offshore

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

oil platform. OCS hired claimant-respondent James Morrison ("Morrison") to repair mechanical equipment on this platform. On October 16, 1997, Morrison injured his back while using a ladder on the platform.[1] One week after his injury, Morrison sought treatment from a chiropractor, Dr. Karri Gramlich ("Gramlich"), who treated Morrison on a regular basis until February 1998. After the accident, Morrison quickly returned to work. Initially restricted to light-duty work, he soon resumed his regular course of activity on the platform, although he continued to experience back pain. In February 1998, Gramlich cleared Morrison to return to the full scope of his previous duties and ceased to treat him, although Morrison continued to complain of discomfort and pain.

In May 1998, Burlington ended its contract with OCS and contracted with respondent Danos & Curole Marine Contractors, Inc. ("Danos & Curole") to provide similar services. Danos & Curole decided to retain Morrison in his position as field mechanic and formally hired him on May 8, 1998, after he successfully completed a pre-employment agility test. Morrison's physical discomfort persisted, however, and he returned to Gramlich for treatment on May 22, 1998.

At this time, Morrison complained to Gramlich of the familiar pain in his lower back, but he also reported numbness and tingling pain in his leg, symptoms which first appeared in March 1998 (before he began working for Danos & Curole). During the administrative hearing,

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[1] More specifically, Morrison testified that he injured his back as he swung over a tall guardrail while climbing down a ladder on a water tank.

Morrison testified that he was involved in several physically strenuous jobs while working for Danos & Curole, including a particularly arduous week in which he performed a total engine overhaul. Following physically strenuous jobs, his back pain would increase, but his symptoms would lessen following rest. Morrison also claimed that he did not think any specific event after the initial injury he suffered while working for OCS caused his condition to worsen, but rather that his back progressively "went down."

Gramlich continued this second round of treatment until September 1998. Despite her efforts, Morrison's condition showed little improvement, and she eventually referred him to a neurosurgeon, Dr. Andrew Wilson ("Wilson"). Wilson began treating Morrison on September 15, 1998, but Morrison's condition continued to worsen, and Wilson advised him to consider surgery. Because Morrison was unable to continue work, Danos & Curole terminated his employment on October 22, 1998. At his administrative hearing, Morrison testified that his condition continued to deteriorate even after he stopped working for Danos & Curole despite the fact that he had wholly avoided strenuous physical activity. Wilson's testimony generally tended to confirm Morrison's account. After a series of diagnostic tests revealed a disc herniation and nerve root impingement, Wilson performed lumbar fusion surgery on July 9, 2001. On June 6, 2002, Wilson declared that Morrison's condition had improved as much as possible, but that Morrison would be left with an eighteen percent whole body impairment, permanently limiting him to light-duty work in the future.

B. Procedural Background

Morrison filed claims for disability compensation and medical expenses against both OCS and Danos & Curole pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* [hereinafter "LHWCA" or "Act"]. OCS voluntarily paid Morrison temporary total disability compensation from September 23, 1998 to June 5, 2002; thereafter, OCS paid Morrison permanent partial disability and medical benefits. OCS asserted that Danos & Curole should be liable for all subsequent and further disability and medical benefits because Morrison's work for Danos & Curole aggravated his original condition. Danos & Curole denied responsibility for Morrison's disability, arguing that it resulted from the natural progression of the injury Morrison suffered on October 16, 1997, while working for OCS.

A formal administrative hearing was held before an administrative law judge ("ALJ") on January 23, 2003. The only issue considered at any length by the ALJ was which of the two employers – OCS or Danos & Curole – was responsible for Morrison's medical expenses and disability compensation. During the hearing, the ALJ considered testimony and evidence provided by Morrison, Gramlich, Wilson, Dr. Anthony Ioppolo, a neurosurgeon who examined Morrison on behalf of OCS on three different occasions, and Martin Knijn ("Knijn"), a physical therapist who conducted Morrison's pre-employment evaluation for Danos & Curole.

On April 16, 2003, the ALJ issued his decision. In this decision, the ALJ accepted Danos & Curole's arguments, finding both that Morrison's disability was attributable to

the natural progression of the injury he suffered in October of 1997 while working for OCS and that his deteriorating back condition was not aggravated during his brief employment with Danos & Curole. Guided in part by this court's en banc opinion in *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986), and based on Wilson's and Gramlich's testimony, as well as Morrison's own description of his symptoms, the ALJ concluded that Morrison's medical condition and resultant surgery were the consequence of his injury on October 16, 1997, and were neither caused nor aggravated by his subsequent employment with Danos & Curole. As a result, the ALJ held OCS responsible for all of Morrison's medical and disability benefits.

OCS appealed the ALJ's decision to the Department of Labor's Benefits Review Board ("BRB" or "Board"), which affirmed the ALJ's ruling on May 14, 2004. In its appeal, OCS essentially argued that the ALJ erred in failing to find that Morrison's underlying back condition was aggravated by his employment duties with Danos & Curole. The BRB rejected OCS's arguments, finding that the characterization of the record evidence and the assessment of the witnesses' credibility offered by OCS did not provide a basis for overturning the ALJ's credibility determinations and evaluation of the evidence.

The petitioners filed their initial petition for review with this court on July 12, 2004.

II. DISCUSSION

The only seriously contested issue before the ALJ was which employer and carrier were liable for Morrison's disability. An administrative fact finder in a case such as

this must apply the "aggravation rule," which requires a detailed examination of the case-specific medical evidence. "The aggravation rule is a doctrine of general workers' compensation law which provides that, where an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable." *Strachan*, 782 F.2d at 517 (citing A. Larson, Law of Workmen's Compensation (1982)); *see also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir.2003) (stating that an employer is liable under the aggravation rule when an employment injury creates, worsens, or combines with a preexisting condition to create a new and greater disability). Where the preexisting impairment results from an injury which occurred during the course of employment with a prior employer such as OCS, a second or final employer such as Danos & Curole is liable under the aggravation rule for the entire cost of an employee's disability if the preexisting impairment was aggravated during the course of the employee's second or final employment. On the other hand, a first employer such as OCS is liable if the employee's ultimate medical condition arises from the "natural progression" of an injury that occurred during the course of the employee's first employment.[2] *Metro. Stevedore Co. v. Crescent Wharf and Warehouse Co.*, 339 F.3d 1102, 1105 (9th Cir.2003).

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[2] The aggravation rule is often known as the "last employer rule," although the two terms are probably not precisely interchangeable; rather, it may be more correct to say that the aggravation rule is the "two-injury branch" of the last employer rule. *See Found. Constructors, Inc. v. Dir., OWCP*, 950 F.2d 621, 623-24 (9th Cir. 1991) (discussing same); *see also Metro. Stevedore*, 339 F.3d at 1104-05 (discussing

(Continued on following page)

In *Strachan*, this court noted both that "the aggravation rule has been consistently applied by this Court in longshoremen cases" and that "the aggravation rule is well-grounded in the statutory language of the LHWCA" – specifically 33 U.S.C. § 903(a), which provides that "compensation shall be payable . . . in respect of disability or death of an employee," 33 U.S.C. § 902(10), which defines disability as "incapacity because of injury," and 33 U.S.C. § 908(f), which provides for payments to employees out of the industry-financed second injury fund. *Strachan*, 782 F.2d at 517. *See also Louis Dreyfus Corp. v. Dir., OWCP*, 125 F.3d 884, 887 (5th Cir. 1997) (stating that under the LHWCA, "employers are liable for the full costs of a worker's disability, even if the disability is the result of both a pre-existing impairment and a current employment injury; this is known as the 'aggravation rule' ").

"two-injury" cases, "occupational disease" cases, aggravating or cumulative traumas, and the "last responsible employer rule").

Technical issues of nomenclature aside, it is clear that for the second or last employer to be liable in a case such as this, there must be evidence of additional trauma or damage that [[As the] [ ]] occurred in the course of the second or last employment. As the Fourth Circuit recently held in a case similar to the matter at hand,

> the "aggravation rule" might apply . . . to a situation where a second trauma occurs in an area first injured during the claimant's prior employment, but since healed to the extent possible. In that instance, the subsequent employer is justifiably responsible for the entire resultant injury. . . . Here, however . . . the ALJ found . . . there was no "second trauma"; instead, there was simply an onset of complications from the *first* trauma.

Admiralty Coatings Corp. v. Emery, 228 F.3d 513, 518 (4th Cir.2000). Here, as in *Admiralty Coatings*, the ALJ's factual finding that Morrison's back injury was not exacerbated by a second trauma fully accorded with the aggravation rule.

The aggravation rule is applied in the other circuits as well. *See, e.g., Marinette Marine Corp. v. OWCP*, 431 F.3d 1032, 1034 (7th Cir. 2005) (stating that under the aggravation rule, a subsequent employer is responsible if the subsequent employment aggravated an earlier injury, but that first employers are responsible if an employee's ultimate condition is attributable to the natural progression of the earlier injury); *Metro. Stevedore*, 339 F.3d at 1105 (stating that "if the worker's ultimate disability is the result of the natural progression of the injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer").

The central task for appellate courts addressing petitions for review from administrative decisions that apply the aggravation rule is the "need to decide whether the ALJ's . . . finding is worthy of deference." *Marinette*, 431 F.3d at 1032. This court reviews "decisions of the Board to determine only whether it 'correctly concluded that the Administrative Law Judge's order was supported by substantial evidence on the record as a whole and is in accordance with law.'" *Conoco, Inc. v. Dir., OWCP*, 194 F.3d 684, 687 (5th Cir. 1999) (quoting *Ingalls Shipbuilding, Inc. v. Dir., OWCP*, 991 F.2d 163, 165 (5th Cir. 1993)).

Substantial evidence in this context "is that relevant evidence – more than a scintilla but less than a preponderance – that would cause a reasonable person to accept the fact finding." *Dir., OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303, 305 (5th Cir. 1997) (citing *Polanco v. City of Austin*, 78 F.3d 968, 974 (5th Cir. 1996)). Because we lack "the expertise necessary to properly evaluate the complex and frequently conflicting testimony of neurological surgeons, orthopedists, and other medical experts. . . . we

must leave this particular fact finding decision precisely where Congress placed it – with the ALJ." *Ceres Marine Terminal v. Dir., OWCP*, 118 F.3d 387, 391 (5th Cir. 1997). "It is fundamental that credibility determinations and the resolution of conflicting evidence are the prerogative of the fact finder, here the ALJ," and the ALJ "'is not bound to accept the opinion of any particular medical expert; he is entitled to weigh the medical evidence including the relative credibility of the competing experts. . . . '" *Atl. Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981) (internal citations omitted) (quoting *Hullinghorst Indus., Inc. v. Carroll*, 650 F.2d 750, 759 (5th Cir. 1981)). On the other hand, statutory interpretations and other decisions of law made by the BRB are reviewed by this court de novo. *Cooper/T.Smith Stevedoring Co. v. Liuzza*, 293 F.3d 741, 744 (5th Cir. 2002) (citing *Equitable Equip. Co. v. Dir., OWCP*, 191 F.3d 630, 631 (5th Cir. 1999)).

The ALJ's decision to impose the costs of Morrison's injury upon OCS was supported by substantial evidence in the record, including, but by no means limited to, the testimony of Wilson and Gramlich. Wilson observed that the flare-ups in pain Morrison suffered while he worked for Danos & Curole did not necessarily indicate that Morrison's disc was suffering further damage while he worked for Danos & Curole. Rather, Wilson claimed that these flare-ups of pain were manifestations of the original physical damage that occurred while Morrison worked for OCS. Although Wilson admitted that Morrison's employment with Danos & Curole might have exacerbated the damage Morrison suffered while working for OCS, he concluded that Morrison's ultimate condition was wholly

attributable to the natural progression of his initial injury.[3] *See, e.g.*, Wilson Dep. 71, 76, 86. Similarly, although Gramlich conceded that working for Danos & Curole might have exacerbated Morrison's condition, she concluded that Morrison's ultimate condition was wholly attributable to the original injury Morrison suffered while

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[3] The following exchange provides a representative example of the evidence provided by Wilson's deposition:

> WILSON: Yeah. In my mind it all flowed, and that's how he ended up getting an operation. And because of the fact that he hurt himself, initially.
>
> QUESTION: And it was a natural progression in your opinion?
>
> WILSON: Yes.
>
> . . . .
>
> WILSON: If the question is, Do I think he hurt himself at the original time when he hurt himself in October. I guess, that's where I thought it all occurred. And I've had lots of patients do well and then they get worse and then they do better and then they get worse and then they eventually need an operation. These are all very interesting questions in terms of like, what was the final thing that broke the camel's back.
>
> QUESTION: And you just can't say that one way or the other, can you
>
> WILSON: Except for the fact that he told me that he hurt his back at that one point in time. And that's where I'd say – if I had to draw a line, I'd say, Okay, I'm drawing the line and the guy says he hurt his back here. And from that point on I met him and we did a lot of things to him and he's gone through a lot.

(Wilson Dep. 86, 101.)

he was employed by OCS.[4] *See, e.g.*, Gramlich Dep. at 41-42, 52.

We are neither doctors nor the original fact finders in this matter, and so, under the appropriate standard of review, we need not assess the plausibility of these medical accounts, nor do we assess the weight they should be

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[4] The following exchange provides a representative example of the evidence provided by Gramlich's deposition:

> GRAMLICH: My opinion is that the disk was created by the injury, the original injury.
>
> QUESTION: And had it not been for this, Mr. Morrison would not have required surgery; is that correct?
>
> GRAMLICH: That's correct. But again, I would refer to Dr. Wilson for his opinion since I don't do surgery.
>
> QUESTION: Based in your area of expertise, this would be your opinion?
>
> GRAMLICH: Yes.
>
> . . . .
>
> QUESTION: Let's get this clarified. If we could just get something clarified. When you say symptoms are relieved, it does not necessarily mean that the underlying condition resolved itself satisfactorily?
>
> GRAMLICH: Correct.
>
> QUESTION: He may still have a bulging disk, but he may not be experiencing a great degree of symptomatology?
>
> GRAMLICH: Correct.
>
> . . . .
>
> QUESTION: Doctor, during that preplacement evaluation [conducted by Knijn in May 1998], Mr. Morrison reported no pain or discomfort. Does that change your opinion regarding whether he was able to do those activities or whether those activities [at Danos & Curole] caused the related new symptomatology?
>
> GRAMLICH: I wasn't there with him. I still believe the accident created a disk problem in October of '97.

(Gramlich Dep. 41-42, 49, 51-52.)

accorded relative to other evidence in the record. *See Pool Co. v. Cooper*, 274 F.3d 173, 178 (5th Cir. 2001) (stating that "like the BRB, 'we may not substitute our judgment for that of the ALJ, nor reweigh or reappraise the evidence, but may only determine whether evidence exists to support the ALJ's findings'") (quoting *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 1030-31 (5th Cir. 1997)). Our task is more limited: we ask only whether this evidence was relevant to the ALJ's decision, and whether the ALJ's decision was reasonable based on this evidence. *Ceres*, 118 F.3d at 389. Wilson and Gramlich, who were ably cross-examined by OCS's counsel, concluded that Morrison's ultimate disability was the natural progression of the initial injury he suffered while working for OCS. This evidence was directly relevant to the ALJ's decision, and the ALJ's decision was reasonable in light of this evidence; therefore, we hold that the BRB correctly found that the ALJ's decision was supported by substantial evidence.

III. CONCLUSION

For the reasons stated above, the petition for review is DENIED, and the decision of the BRB is AFFIRMED.

BENEFITS REVIEW BOARD

BRB No. 03-0541

JAMES MORRISON Claimant-Respondent v. OPERATORS AND CONSULTING SERVICES, INCORPORATED and ZURICH AMERICAN INSURANCE COMPANY Employer/Carrier-Petitioners DANOS & CUROLE MARINE CONTRACTORS, INCORPORATED and THE GRAY INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: May 14, 2004 DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Joseph B. Guilbeau and Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for Operators and Consulting Services, Inc. and Zurich American Insurance Company.

Douglass M. Moragas, Harahan, Louisiana, for Danos & Curole Marine Contractors, Inc. and the Gray Insurance Company.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Operators and Consulting Services, Inc. (OCS) appeals the Decision and Order (2002-LHC-0952) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, during the course of his employment as a field mechanic for OCS, injured his back on October 16, 1997, while working on an offshore platform.[1] After returning to shore, claimant obtained chiropractic treatment from Dr. Gramlich. Thereafter, claimant worked a few hitches of light duty work, and then resumed his regular duties on the platform, although he continued to experience back pain. Dr. Gramlich treated claimant until February 1998, when he had reached a plateau in his recovery and the doctor advised him to return to her if his pain worsened. DX 14 at 24-25, 39; Tr. at 34-36, 53-55, 72, 82-83. In May 1998, Burlington Resources, the platform operator, terminated its contract with OCS, and contracted with Danos & Curole Marine Contractors, Inc. (Danos) to

provide workers for the platform. After successfully completing a pre-employment agility test, claimant was hired by Danos on May 8, 1998, to perform the same duties as a field mechanic that he had previously performed for OCS. DXS 9; 15; Tr. at 37-38, 42-45, 59-63, 68-69. In May 1998, claimant returned to Dr. Gramlich because of numbness and tingling in his left leg, symptoms which had worsened since they first developed in March 1998. DX 14 at 25-26, 37, 44-47; Tr. at 36, 45, 57-58, 72-73, 83. Dr. Gramlich resumed treatment of claimant, but when his continued back pain and left leg symptoms had not resolved by September 1998, she referred him to Dr. Wilson, a neurosurgeon. DX 14 at 24-27, 38-39, 43-47; Tr. at 39, 65-66, 73, 90. After initiating treatment with Dr. Wilson on September 15, 1998, claimant stopped working and was terminated by Danos on October 22, 1998. DXS 1; 12 at 8; Tr. at 39-40, 65, 78, 85. Because a series of diagnostic tests revealed a disc herniation and nerve root impingement, and claimant's complaints of pain worsened, Dr. Wilson performed a lumbar fusion on July 9, 2001. DXS 1; 12. Claimant filed claims under the Act against both OCS and Danos. EX 9. Although OCS voluntarily paid claimant temporary total disability compensation from September 23, 1998 to June 5, 2002, and thereafter permanent partial disability and medical benefits, *see* JX 1; DX 6; Tr. at 20, it asserted that Danos should be held liable for all disability and medical benefits due claimant on the basis that claimant's work for Danos aggravated his initial injury, resulting in his disability. The sole issue presented at the formal hearing was the determination of the employer responsible for claimant's disability and medical benefits. Decision and Order at 2; JX 1.

In his Decision and Order, the administrative law judge determined that claimant's disabling back condition resulted from the natural progression of his October 16, 1997 injury with OCS. The administrative law judge thus found OCS to be responsible for all disability and medical benefits due claimant.

On appeal, OCS challenges the administrative law judge's responsible employer determination. Danos responds, urging affirmance of the administrative law judge's decision in its entirety.

OCS essentially argues on appeal that the administrative law judge erred in failing to find that claimant's underlying back condition was aggravated by his employment duties with Danos. In cases under the Act involving multiple traumatic injuries, the determination of the employer responsible for the payment of claimant's benefits turns on whether the claimant's condition is the result of the natural progression or an aggravation of a prior injury. If the claimant's disability resulted from the natural progression of the initial injury, then the claimant's employer at the time of that injury is the employer responsible for compensating the claimant for the entire disability. If, on the other hand, the conditions of employment with a subsequent employer aggravated, accelerated, or combined with the earlier injury, resulting in the claimant's disability, the employer at the time of the second injury is liable for all medical expenses and compensation related thereto. *See Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price],* 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003); *Delaware River Stevedores, Inc. v. Director, OWCP,* 279 F.3d 233, 35 BRBS 154(CRT) (3d Cr. 2002); *Foundation Constructors, Inc. v. Director, OWCP,*

950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Siminski v. Ceres Marine Terminals,* 35 BRBS 136 (2001).

In seeking to overturn the administrative law judge's responsible employer determination, OCS initially argues that the administrative law judge erred in concluding that claimant's initial injury was not aggravated by his subsequent employment with Danos on the basis that claimant did not sustain a specific traumatic accident while working for Danos.[2] OCS br. at 16-18. Contrary to OCS's assertion, however, a review of the administrative law judge's decision reveals that the administrative law judge applied the correct legal standard when considering whether claimant's ongoing work performance with Danos aggravated or combined with his prior back injury to create his ultimate disability.[3] Decision and Order at 15-16; *Price,* 339 F.3d at 1105, 37 BRBS at 90(CRT). Accordingly, we reject OCS's initial allegation of error.

OCS next contends that the administrative law judge's responsible employer determination is not supported by substantial evidence. We disagree. In determining that claimant's present disability is the result of the natural progression of his October 16, 1997, original injury, the administrative law judge credited the testimony of Drs. Wilson and Gramlich, as well as claimant's testimony regarding his symptoms and work activities. Decision and Order at 14-16. The administrative law judge found that claimant's condition had not resolved at the time he began working for Danos and that claimant did not become symptomatic because of an aggravation occurring as a result of his employment with Danos. The administrative law judge credited claimant's testimony that his back condition progressively deteriorated from the time of his initial injury on October 16, 1997, that he continued to

experience lower back pain in February 1998, and that he first experienced left leg symptoms in March 1998, prior to the date he commenced work for Danos. Decision and Order at 14-15; DX 14 at 24-26, 37, 44-47; Tr. at 34-36, 45, 53-58, 65, 72-74, 80-85. The administrative law judge next determined that claimant's successful completion of Danos's pre-employment agility test did not establish that his back condition had resolved by May 1998, having inferred from the testimony of claimant and Mr. Knijn, the physical therapist who administered the test, that claimant's successful completion of the test demonstrated only that claimant was capable of performing most of his job duties for a limited amount of time. Decision and Order at 15; Tr. at 60-62, 68-69, 77, 85-87; DXS 11, 15. Moreover, the administrative law judge fully considered claimant's testimony regarding his work duties at Danos, finding that such testimony did not demonstrate that claimant's disabling back condition was the result of an aggravation sustained in the performance of his work at Danos.[4] Decision and Order at 15-16. Lastly, the administrative law judge credited the opinions of claimant's treating physicians, Dr. Wilson, a neurosurgeon, and Dr. Gramlich, a chiropractor, which he found constituted substantial evidence supporting his determination that claimant's disabling back condition is the result of the natural progression of his October 16, 1997 injury.[5] Decision and Order at 16; DXS 12 at 68-71, 76-77, 80-86, 97-98, 101-106; 14 at 39-41, 49, 52.

Although OCS argues on appeal that the findings of the administrative law judge are not supported by various pieces of documentary evidence and testimony, we conclude that the competing characterization of the record evidence and assessment of the witnesses' credibility

offered by OCS does not provide a basis for overturning the administrative law judge's credibility determinations and evaluation of the evidence. It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and has considerable discretion in evaluating the evidence of record. *See James J. Flanagan Stevedores, Inc. v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 373 U.S. 954 (1963). Moreover, the administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *See Gallagher*, 219 F.3d at 430, 34 BRBS at 37(CRT); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). As the administrative law judge's assessment of the credibility of each of these witnesses and his inferences drawn from the record evidence are rational, they are affirmed. *Id.* We hold that the administrative law judge's finding that claimant's disabling back condition is due to the natural progression of his October 16, 1997 injury at OCS and that OCS is the responsible employer is supported by substantial evidence and is consistent with the applicable legal principles and is therefore affirmed. *See Price,* 339 F.3d 1102, 37 BRBS 89(CRT).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief

Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge

BETTY JEAN HALL

Administrative Appeals Judge

NOTE: This is a LHCA Unpublished Document

[1] Claimant testified that in order to climb down a ladder from the top of a water tank to the platform below, he had to swing his leg over a tall guardrail on the water tank; as he did so he felt an excruciating pain in his lower back. He took the rest of the day off, and thereafter performed light duty for the remainder of his seven-day hitch on the platform. *See* Tr. at 32-33, 52-53, 69-71.

[2] OCS correctly notes that the issue of whether claimant would have required back surgery regardless of his work at Danos is not dispositive of the responsible employer issue. *See* OCS br. at 17; *Price,* 339 F.3d at 1107, 37 BRBS at 91(CRT). The administrative law judge, however, did not base his responsible employer determination on a finding that claimant eventually would have required surgery notwithstanding his employment with Danos. Similarly, OCS asserts that a second injury need not be the *primary* factor in the resultant disability and that the fact that the initial injury was the precipitant event is not determinative of the responsible employer. *See* OCS P/R at 18; *Delaware River Stevedores, Inc.,* 279 F.3d at 243, 35 BRBS at 161(CRT); *Foundation Constructors, Inc.,* 950 F.2d at 624, 25 BRBS at 75 (CRT). The administrative law judge in the instant case, however, did not base his responsible employer determination on these factors.

[3] OCS correctly states that the aggravation of an underlying condition need not be produced by an identifiable traumatic incident, but may be caused by cumulative trauma resulting from work activities or conditions. *See* OCS br. at 17-18; *Foundation Constructors,* 950 F.2d 621, 25 BRBS 71(CRT); *Kelaita v. Director, OWCP,* 799 F.2d 1308 (9th Cir. 1986); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). OCS similarly argues that the evidence in the instant case that claimant's

symptoms were temporarily exacerbated by his performance of strenuous work for Danos, is sufficient to hold Danos liable as responsible employer. *See* OCS br. at 20-21. However, the fact that the claimant sustained a temporary exacerbation with a subsequent employer is not determinative of the responsible employer issue. Rather, in cases involving multiple traumatic injuries, the responsible employer determination depends on the cause of the claimant's *ultimate disability;* only if the disability is at least partially the result of trauma sustained in employment with a subsequent employer is the subsequent employer liable. *See Price,* 339 F.3d at 1105, 37 BRBS at 90(CRT). If, on the other hand, the ultimate disability results from the natural progression of the initial injury, and not from any subsequent trauma, the first employer remains liable. *Id.*

[4] The administrative law judge credited claimant's testimony that he "worked smart" and availed himself of help from other employees and machines in performing jobs involving lifting and other physical demands. Decision and Order at 15; Tr. at 43-46, 49-51, 75-78, 81.

[5] Citing Dr. Wilson's deposition testimony indicating that claimant's flare-ups represented cumulative trauma which aggravated claimant's back condition, OCS assigns error to the administrative law judge's finding that Dr. Wilson's opinion supports a finding that claimant's disability is the result of the natural progression of his initial injury. OCS br. at 25; DX 12 at 52, 68, 97-98. The administrative law judge, however, explicitly recognized that Dr. Wilson acknowledged the possibility that claimant's work for Danos may have exacerbated his condition, but the administrative law judge found that Dr. Wilson's testimony, considered in its entirety, reflected his opinion that claimant's condition was the result of the natural progression of his initial injury. Decision and Order at 7-10, 16.

OCS further avers that Dr. Ioppolo's opinion supports a finding that claimant's condition was exacerbated by his employment with Danos. OCS br. at 25; DX 13 at 39-40, 46-47, 84. However, Dr. Ioppolo also testified that it was equally probable that claimant's back condition was the result of natural progression of the initial injury. DX 13 at 80-81.

OPERATORS & CONSULTING SERVICES, INCORPORATED; ZURICH AMERICAN INSURANCE COMPANY, Petitioners, versus DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR; DANOS & CUROLE MARINE CONTRACTORS INCORPORATED; GRAY INSURANCE COMPANY; JAMES MORRISON, Respondents.

No. 04-60598 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

130 Fed. Appx. 692; 2005 U.S. App. LEXIS 8397

May 12, 2005, Filed

JUDGES: Before JONES, BARKSDALE and PRADO, Circuit Judges.

OPINION BY: Edward C. Prado

OPINION: EDWARD C. PRADO, Circuit Judge:*

This appeal involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("the Act").[1] In their petition for review, petitioners Operators and Consulting Services, Inc. and Zurich American Insurance Company (together, "OCS") ask this court to set aside an order by the Administrative Law Judge ("ALJ") holding them responsible for the claimant's

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

[1] 33 U.S.C. §§ 901-50.

disability compensation and medical costs. For the reasons discussed below, this court denies OCS's petition for review.

Factual Background

Before the injury which is at the heart of this appeal occurred, OCS provided workers for the operation of an offshore platform pursuant to a contract with Burlington Resources. OCS hired claimant-respondent James Morrison as a field mechanic to repair mechanical equipment on the platform. As a mechanic, Morrison was required to carry equipment weighing up to 75 pounds. On October 16, 1997, Morrison injured his back while climbing up a ladder. A week after the accident, Morrison sought treatment for his injury from Dr. Karri Gramlich, a chiropractor. Dr. Gramlich treated Morrison until February 1998, at which point she reported that Morrison was ready to resume work on a normal basis.

In May 1998, Burlington Resources terminated its contract with OCS and contracted with respondent Danos & Curole Marine Contractors ("Danos & Curole") to provide workers for the platform. Danos & Curole hired Morrison on May 8, 1998 after he successfully completed a preemployment agility test. On May 22, Morrison returned to Dr. Gramlich for treatment, complaining of pain in his left leg. Dr. Gramlich treated Morrison until September 1998. Because his condition showed little improvement, Dr. Gramlich referred Morrison to Dr. Andrew Wilson, a neurosurgeon. Dr. Wilson began treating Morrison on September 15, 1998, but Morrison's condition worsened to the point that he was unable to continue working. Danos

& Curole terminated Morrison on October 22, 1998. Dr. Wilson operated on Morrison's back on July 9, 2001.

Morrison filed claims for disability compensation and medical expenses under the Act against both OCS and Danos & Curole. Danos & Curole denied responsibility for Morrison's disability, maintaining that the disability resulted from the natural progression of the October 16, 1997 injury Morrison suffered while working for OCS. After considering the evidence, the ALJ agreed with Danos & Curole. The ALJ found that Morrison's disability was attributable to the injury he sustained while working for OCS and that Morrison's back condition was not aggravated by his employment with Danos & Curole. The ALJ, therefore, concluded that OCS was responsible for all of Morrison's disability compensation and medical expenses.

OCS appealed to the Department of Labor's Benefits Review Board ("the Board"). The Board affirmed the ALJ's ruling. OCS now asks this court to set aside the ALJ's order.

Standard of Review

This court reviews a decision of the Board using the same standard the Board applies to review a decision of the ALJ.[2] That is, this court determines whether the ALJ's decision is supported by substantial evidence.[3] "Substantial evidence is that relevant evidence – more than a scintilla but less than a preponderance – that would cause

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[2] *SGS Control Servs. v. Dir., Office of Worker's Comp. Programs, United States DOL*, 86 F.3d 438, 440 (5th Cir. 1996).

[3] *SGS Control Servs.*, 86 F.3d at 440.

a reasonable person to accept the fact finding."[4] This court may not substitute its judgment for that of the ALJ, nor reweigh or reappraise the evidence; instead, it may only determine whether evidence exists to support the ALJ's findings.[5] This court will uphold the Board's decision if the ALJ's decision is supported by substantial evidence.[6]

Analysis

OCS challenges the ALJ's determination that it is solely responsible for Morrison's disability. OCS maintains that Morrison's injury was aggravated while he worked for Danos & Curole, and that as a result, Danos & Curole is liable for the costs of Morrison's disability. Specifically, OCS contends that the ALJ misapplied the "aggravation rule."

The "aggravation rule" is a judicially created rule for allocating liability among employers for a worker's injury.[7] The rule provides that if a claimant's disability arose from the natural progression of an injury sustained while working for the first employer, that employer is completely liable for the subsequent expenses the claimant incurs from the injury, even after the claimant no longer works

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[4] *Dir., Office of Workers' Comp. Programs, United States DOL v. Ingalls Shipbuilding*, 125 F.3d 303, 305 (5th Cir. 1997).

[5] *SGS Control Servs.*, 86 F.3d at 440.

[6] 33 U.S.C. § 921(b)(3).

[7] *See Cooper/t. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 749 (5th Cir. 2002) (discussing the aggravation rule for allocating liability for an occupational disease that develops after prolonged exposure to an injurious stimuli).

for the first employer.[8] However, in cases where the disability results from cumulative traumas, the responsible employer depends upon the cause of the worker's ultimate disability.[9] If the disability is "at least partially the result of a second trauma that occurs while working for a second employer and that injury aggravates, accelerates or combines with the prior injury to create the ultimate disability," the second employer is liable for all medical expenses and compensation.[10] Thus, the dispositive issue in this appeal is whether Morrison's disability arose from the natural progression of the injury suffered on October 16, 1997 while he worked for OCS, or whether his disability was caused by an aggravation, exacerbation, or acceleration of that injury while he worked for Danos & Curole.

Here, substantial evidence supports the ALJ's finding that Morrison's disability resulted solely from the injury he suffered during his employment with OCS. Dr. Wilson testified in his deposition that he began treating Morrison in September 1998. Dr. Wilson opined that Morrison's injury naturally progressed to the point that surgery was the only way to mitigate further damage. Dr. Wilson admitted, however, that there was a possibility that Morrison's employment with Danos & Curole exacerbated Morrison's condition.

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[8] *See Metro. Stevedore Co. v. Crescent Wharf & Warehouse Co.*, 339 F.3d 1102, 1105 (9th Cir. 2003) (describing the last responsible employer rule – otherwise known as the aggravation rule – in the context of an occupational disease); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986) (explaining that this circuit has consistently applied the aggravation rule in longshoremen cases).

[9] *Metro. Stevedore Co.*, 339 F.3d at 1105.

[10] *Id.*

Dr. Gramlich also attributed Morrison's surgery to the injury that occurred in October 1997. She acknowledged that working for Danos & Curole may have aggravated Morrison's back condition, but opined that the herniated disk that required surgery resulted from Morrison's original injury during his employment with OCS.

In addition, Morrison testified that he continued to experience lower back pain while working for OCS. Morris explained that nothing about his job changed when he began working for Danos & Curole. He stated that he continued to perform the same job on the same platforms, but explained that he worked smarter to avoid hurting his back. He described his job with Danos & Curole as neither more nor less strenuous than his work with OCS. Together, testimony from these witnesses constitutes substantial evidence that Morrison's disability resulted from the natural progression of the injury he suffered in October 1997.

OCS argues that passing the preemployment agility test shows that Morrison's back was no longer impaired when he began working for Danos & Curole. However, Martin Knijn, the physical therapist who conducted the agility test, testified that the test was designed to test capabilities, not the amount of stress the back could sustain. Knijn explained that the successful completion of the test demonstrates that an employee is capable of performing most of his job duties for a limited amount of time. Thus, passing a preemployment agility test does not necessarily indicate that Morrison's initial back injury was resolved by the time he began working for Danos & Curole.

OCS also argues that Morrison's strenuous work activities with Danos & Curole over a five month period demonstrate that the disability arose from an aggravation or acceleration of a preexisting injury. Morrison, however, testified that his job with Danos & Curole was neither more nor less strenuous than his work with OCS, and he did not testify that he suffered a subsequent injury. Although Morrison explained that Dr. Gramlich released him to return to work for OCS, substantial evidence indicates that he was not symptom-free at that time and that his pain progressively increased throughout the time he worked for OCS.

Substantial evidence supports the ALJ's finding that Morrison's disability resulted from the natural progression of his October 1997 injury; thus, under the "aggravation rule," OCS, as the first employer, is solely responsible for Morrison's disability.

Conclusion

The ALJ did not err by determining that OCS is responsible for Morrison's disability compensation and medical costs because substantial evidence indicates that Morrison's disability was caused by his injury while working for OCS. As a result, the Board properly affirmed the ALJ's decision. Consequently, this court DENIES the petition for review.

PETITION DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60598
Summary Calendar

OPERATORS & CONSULTING SERVICES, INCORPORATED; ZURICH AMERICAN INSURANCE COMPANY,

Petitioners,

versus

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR; DANOS & CUROLE MARINE CONTRACTORS INCORPORATED; GRAY INSURANCE COMPANY; JAMES MORRISON,

Respondents.

Petition for Review of an Order
of the Benefits Review Board
03-0541

(Filed July 25, 2005)

Before JONES, BARKSDALE and PRADO, Circuit Judges.

PER CURIAM:

The court on its own motion VACATES the opinion issued in this case on May 12, 2005 and DENIES the petitioners' motion for rehearing en banc as moot. The court DIRECTS the clerk to schedule this appeal for oral argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60598

OPERATORS & CONSULTING SERVICES, INCORPORATED; ZURICH AMERICAN INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR; DANOS & CUROLE MARINE CONTRACTORS INCORPORATED; GRAY INSURANCE COMPANY; JAMES MORRISON,

Respondents

Petition for Review of an Order
of the Benefits Review Board

ON PETITION FOR REHEARING EN BANC

(Filed May 22, 2006)

(Opinion 03/31/06, 5 Cir., ___, ___ F.3d ___)

Before JONES, Chief Judge, and KING and DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge